



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
ENVIRONMENT & LAND COURT
CIVIL APPEAL NO.110 OF 2008

LAWRENCE KAIRU NYAMBURA.....APPELLANT

VERSUS

SYMON KABUGI KINYURU.....RESPONDENT

R U L I N G

The application before court is dated 18/6/2014. The applicant prays for an order that the Honourable Court be pleased to find the respondent to have resisted and/or obstructed the applicant in obtaining possession of 10 hectares/25 acres of his land in Nyeri/Watuka/739. That the Honourable Court be pleased to order the applicant to be put into possession of the said land forthwith and to issue warrant of arrest upon the respondent herein together with Njuguna Nyambura, Nicholas Mbogo Kairu and Jane Njeri Mbogo and order them to be detained in prison for being perpetrators of obstruction and/or resistance to the applicants obtaining possession of the said land. He prays that this court be pleased to order the caution lodged by the respondent in land parcel No. Nyeri/Watuka/739 withdrawn and that the respondent to compensate the applicant for loss of 10 hectares from year 1967 and/or from the time this court may deem just and expedient to the time he gives possession at the rate of Kshs.250,000/= per year being the sum he collects in leasing the said land. Lastly, to review the judgment on issue relating to cost of this appeal there being a discovery of new and important matter or evidence which with all due diligence was not within the knowledge of the applicants.

The application is based on grounds that upon the ruling of this honourable court issued on 16/5/2014 and dismissal of the respondents application dated 20/5/2014 the Land Registrar visited the suit lands parcel No.Nyeri/Watuka/738 and Nyeri/Watuka/739 on 12/6/2014 and implemented the ruling thereby re-fixing the boundary and found out that 10 hectares of Nyeri/Watuka/739 was in Nyeri/Watuka/738. The registrar showed the applicant where the boundary is whereby he made marks and the applicant on instructions of the Land Registrar fixed poles which the respondent together with other persons mentioned herein above at his instigations uprooted and has denied the applicant possession of the said 10 hectares. The respondent together with the persons above named are acting in a manner likely to cause a breach of peace in that they are threatening the applicant whenever he tries to gain possession of the land with pangas, machetes and spears and have on several occasion chased away the applicant together with his brothers. He claims that upon the re-fixing of the new boundary the applicant has proved his claim fully and is entitled to cost of this appeal and courts below which warrants a review of the judgment on issue relating to cost and that the respondent has unfairly been benefiting with the 10 hectares despite having been sued in a court of law and has ignorantly refused to comply with this court ruling of 25th September 2013. Lastly, that the respondent has declined to withdraw the caution which he lodged against land

parcel No.Nyeri/Watuka/739 on 8/3/2004.

The application is supported by the affidavit of Simon Kabugi Kinyuru who states that the decree holder is his deceased father Moses Kinyuru Gathogo and he has made all efforts to have the decree executed against the respondent herein who was adjudged by the decree. That this court made a ruling on 16/5/2014 which was implemented by the Land Registrar on 12/6/2014. That upon implementation 10 hectares were found to have been in occupation of the respondent. That upon the Land Registrar re-fixing the boundary he fixed poles to where the boundary was on instructions of the Land Registrar. On 14/6/2014 the applicant together with his brothers tried to re-fix the posts but was chased away by the respondent together with his brother and a son armed with machetes and other dangerous weapons.

On 17/6/2014 at the instigation of the respondents the persons namely, Njuguna Nyambura, Nicholas Mbogo Kairu and Jane Njeri Mbogo armed with spears, machetes and pangas chased the applicant away when he tried to gain possession of his land. That resistance and or obstruction is likely to cause a breach of the peace and can bear unprecedented results if not controlled. The respondent has lodged a caution on Nyeri/Watuka/739 claiming beneficiary interests and has declined to withdraw it despite having lost this appeal. That upon re-fixing of the new boundary the applicant has proved his claim fully and is entitled to cost of this appeal and courts below which warrants a review of the judgment on issue relating to cost. The respondent has unfairly been benefiting with the 10 hectares despite having been sued in a court of law and has ignorantly refuse to comply with this court's ruling on 25th September 2013. That its only fair and just that this court grants the orders applied for herein to ensure full implementation of its rulings and full execution of its decree.

The application is opposed by the respondent in the replying affidavit filed on 26/6/2014, he states that the Honourable Court has not yet ruled on the Land Registrar report dated 12/6/2014. That it is only after the adoption of the land registrar's report by the court that such an application can be made. The report that was to be filed in court within 30 days has not been read to parties. The applicant is acting hastily prematurely and in a provocative manner by trying to take possession of the disputes portion as his homestead and other developments are still intact. That he is not obstructing him from taking possession or destroying anything but he should wait for the final decision of the honorable court.

Njuguna Nyambura, Nicholas Mbogo Kairu and Jane Njeri Mbogo have done nothing to warrant such an application as some of them live far away from the area. The issue of removal of caution, costs or compensation are being raised prematurely as he intend to challenge the land registrar's report after it is read to them. That once the honorable court dismissed the appeal, it become functus officio and he intends to challenge the entire proceedings made thereafter. That the applicant should not assume that this dispute is over because it is not.

In his submissions, the applicant argues that the Land Registrar went to the ground and showed them the beacons. The applicant was given a copy of the report which he prepared in compliance with the order of the court. He prayed that the report be adopted by the court. The respondent uprooted the beacons that had been placed on the ground by the Land Registrar. He submits that the respondent should vacate the land and he should be allowed to enter his land. The caution placed on parcel of land No.739 to be removed.

Mr. Wachira on his part argues that the application is premature because the report has never been read to the parties. The registrar was to come to court and read the report. He argues that the Provincial Appeals Committee ordered the Land Registrar to settle the matter. The Land Registrar deliberated the matter and filed his report but his court ordered him to do specific things and therefore the matter is in the Court of Appeal.

The chronology of decision in this matter are that on 1/7/2002 the Kieni East Land Disputes Tribunal made an award to the effect that the existing boundary between plot No.Nyeri/Watuka/739 of Moses Kinyuru Gathogo and Nyeri/Watuka/738 of Grace Nyambura Kairu to remain as it was fenced in 1967.

This decision was made pursuant to a dispute lodged by Moses Kinyuru Gathogo. The gist of the dispute

was that the two parcels of land in dispute namely Nyeri/Watuka/738 which is owned by the respondent is 29 hectares while Nyeri/Watuka/739 owned by the applicant's father who is deceased is 39 hectares. The map and the green card indicate that Nyeri/Watuka/739 is 39 hectares whilst Nyeri/Watuka/738 is 29 hectares. On the ground Nyeri/Watuka/739 is 29 hectares whilst Nyeri/Watuka/738 is 39 hectares.

The dispute was properly filed at the Land Disputes Tribunal because the same revolved on a boundary which was to be determined by the Land Disputes Tribunal in accordance with the Land Disputes Tribunal Act No.18 of 1990.

Upon the Kieni East Land Disputes Tribunal making its decision, the applicant's father appealed to the Central Province Appeals Committee which made this brief observation ***“both parties The Tribunal Award was for the existing boundary between plot No.Nyeri/Watuka/739 of Moses Kinyuru Gathogo and Nyeri/Watuka/738 of Grace Nyambura Kairu to remain as it was fenced in 1967 upto date. A map was produced showing plot No.Nyeri/Watuka/739. The appellant Moses Kinyuru Gathogo produced a title No.Nyeri/Watuka/739 approximately 39.0 hectares but claimed his parcel on the ground by a green card for title No.Nyeri/Watuka/7398 reading approximately 29 hectares.*”**

The provincial panel having listened to both sides and having perused all the relevant documents keeps Nyeri Tribunal aside and rule that Nyeri District Registrar visit the site and settle the dispute of the suit parcel No.Nyeri/Watuka/738 and 739, 60 days of appeal awarded. No costs awarded.”

The import of the decision of the Appeals Committee was that the boundaries be fixed in accordance with the map produced showing plot Nos. Nyeri/Watuka/739 and 738 measuring 39.0 hectares and 29.0 hectares respectively. The Land Registrar was bound to observe this two documents in settling the matter.

The respondent appealed to the High Court against the award issued by the Central Province Land Disputes Appeals Committee, however the appeal was dismissed as both the Mweiga Land Disputes Tribunal and the Central Province Appeals Committee had the jurisdiction to entertain the dispute.

The decision of the High Court marked the end to litigation in this matter as not of the parties went to the Court of Appeal. What remains is the execution of the decision of the Appeals Committee.

On the 16/1/2012 the applicant herein applied to be made a party in this matter and further requested this court to join the Land Registrar as party in this case and to compel him to visit the suit land and fix the boundaries in question inter-alia.

On the 18/2/2013, this court ordered the District Land Registrar to appear in court on the 19/2/2013 to explain why he was unable to enforce the orders of the Court and the Provincial Appeals Committee in respect of parcels of land No.Nyeri/Watuka/738 and 739. The Land Registrar came to court on 21/2/2013 and promised to visit the disputed boundary on the 1/8/2013 to settle the boundary. By the 21/1/2014, the Land Registrar had not visited the disputed parcels of land. When the matter came before me on the 21/1/2014, the parties agreed by consent that the Land Registrar was to visit the site and settle the boundary dispute.

On 2/7/2014, the Land Registrar Nyeri filed a report on determination of an uncertain boundary under Section 18 of the Land Registration Act No.3 of 2012 in boundary dispute case No.04 of 2012 filed at Nyeri Lands Office.

The report was prepared after the visitation of the site by Land Registrar Nyeri County Land Registration, County Surveyor, Survey Assistant, Area Chief and Assistant Chief Embaringo.

The applicant was present at he site but the respondent was absent without apology.

The beacons were placed by the surveyor on the ground covering 10.0 hectares out of parcel No.738 and including the said 10.0 hectares to parcel No.739. The District Surveyor gathered the Area Chef,

Assistant Chief, the applicant and pointed to them the new boundary.

The Land Registrar Nyeri ordered that the boundary between land parcel No.Nyeri/Watuka/738 measuring 29.0 hectares and Nyeri/Watuka/739 measuring 39.0 hectares to remain as shown to the available portions. The Area Chief to oversee the fencing exercise on a date to be agreed upon by the parties which shall not exceed 60 days from the date of the ruling. All other rulings on this boundary by the office were set aside.

This court does not agree with Mr. Kebuka Wachira's argument that the application herein is premature as the same was filed after the report by the Land Registrar was made though filed later in this court. The report was made on 12/6/2014 and filed on 2/7/2014. Though it was provident that the applicant herein files the application after the report being filed in court the same is not fatal to the application as the report was not subject to submissions by parties as the same is final. The report is on record and should be complied with. The respondent is hereby ordered to voluntarily surrender the 10 disputed acres to the applicant withing the next 30 days failure of which the applicant is hereby allowed to take possession of 10 hectares as ordered by the Land Registrar forthwith. The area Chief to supervise the exercise. The caution lodged by the respondent in land parcel No.Nyeri/Watuka/739 is hereby vacated and/or withdrawn. The other prayers are not allowed save costs of this application which are awarded to the applicant.

Dated, signed and delivered at Nyeri this 23rd Day of September, 2014

A. OMBWAYO

JUDGE